IN THE

Supreme Court of the United States

OCTOBER, 1947 TERM.

No. 139.

JOSEPH ESTIN,

Petitioner,

against

GERTRUDE ESTIN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONER'S PETITION FOR A REHEARING OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Statement

By Order dated October 13th, 1947, this Honorable Court denied the Petitioner's Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

Fifty-one days had elapsed before the Petitioner served a copy of his Petition for a Rehearing on Respondent's attorney, twenty-six days after the last day allowed by Rule 33 of this Court for the filing of such petition.

The reason given for the delay is the decision of this Honorable Court on November 24th, 1947 in granting a Writ of Certiorari to the New York Court of Appeals in the case of *Kreiger* v. *Kreiger,* No. 371, October Term 1947.

No reason is given for the wait and delay from November 24th, 1947 to December 6th, 1947. The four page Petition, which Petitioner's Counsel served, shows no further research, and certainly no great time or study was required to compose it.

The respondent, Mrs. Gertrude Estin, is damaged and hampered by the delay. She has not received any money from the Petitioner since May 1945 (R. 15, R. 77). There is due and owing to her the amount of the present judgment appealed from herein, $2,441.90 with interest and costs (R. 11) and in addition a second judgment for arrears of alimony which have accrued since the entry of the aforesaid judgment appealed from, which second judgment in the amount of $2,650.50 was entered in the Supreme Court of New York, Queens County, on the 25th day of September 1947. The Petitioner herein, defendant below, has stated that he would fight the respondent to the end (R. 119).

Mrs. Estin works as a secretary for an Insurance Agency in Wall Street, New York (R. 69), at a salary of $40.00 per week to support herself. The fact of the amount of her earnings is not in the record before the Court but is well known to the Petitioner's Counsel and to the Petitioner and is established by at least two affidavits on file in the County Clerk's Office in Queens County, New York, in the files of this case. Her salary affords her a bare living and her counsel in this case has been paid by allowances of counsel fees which the Court has ordered the petitioner, her husband, to pay (R. 10) and other allowances which the Court has made by orders entered after the record before this Honorable Court was made up and therefore do not appear in the record.

The Order denying Petitioner's Petition for a Writ of Certiorari herein, on October 13th, 1947, did not contain an allowance of costs to the Respondent to pay her damages occasioned by the filing of said Petition. She was put to an expense of $100.00 to print the briefs which were filed in opposition to the Petition for a Writ of Certiorari. The Respondent thinks that she is entitled to such an allowance of costs pursuant to Section 352, Chapter 9, Title 28 of the United States Code.

Notwithstanding the statement of Counsel for the Petitioner on page 2 of his brief, first paragraph, the case of *Estin* v. *Estin,* now under consideration does not present the same question of constitutional law as was presented in the case of *Kreiger* v. *Kreiger,* No. 371 October Term, 1947 and the questions of law presented by the record in the said case of *Kreiger* v. *Kreiger* are not *identical* with the questions of law presented by the record in this case, *Estin* v. *Estin.*

In opposing the Petition for a Writ of Certiorari in the case of *Kreiger* v. *Kreiger,* the counsel for Mrs. Kreiger did not follow or comply with rule 27, par. 4 of the Rules of the Supreme Court of the United States, or with Rule 38, par. 3. It is possible that failure to comply with these rules may have been the reason for the granting of the Writ of Certiorari (2nd paragraph of Rule 38).

Notwithstanding the statement of Petitioner's Counsel in his brief, page 2 thereof, second paragraph, Joseph Estin's divorce decree which he obtained in Reno, Nevada in May 1945, *is not valid.* It appears on the face of the record before this Honorable Court that the identically same testimony was heard in the Separation Action of

Gertrude Estin against Joseph Estein in the Supreme Court of New York in Queens County in May 1943, which lead to the judgment herein on October 13th, 1943, as was heard in the divorce action in Reno, Nevada in May 1945, between the identically same parties, Joseph Estein, plaintiff, vs. Gertrude Estin, defendant; that they were married at Crown Point, Indiana, on July 20th, 1937; that they lived together as man and wife in New York City for more than five years prior to the hearing in the separation action in the New York Supreme Court on October 13th, 1943; that Joseph Estin, the defendant in New York, plaintiff in Reno and Petitioner here wilfully left the home of himself and his wife in Queens County, New York and never returned; that there is no issue of said marriage (R. 127; R. 62; R. 63; R. 76; R. 77). In the two actions there was no more, other or different testimony, except that in the Nevada divorce action there was evidence as to Joseph Estin's movements *after* the entry of the Judgment of Separation in Queens County, New York, on October 13th, 1943, to show that Mr. Estein subsequently to that date left New York and became a domiciliary of Washoe County, Nevada.

The testimony as to material facts of the essence of both causes of action is identical.

In the first action, the New York Supreme Court gave Mrs. Estin a Separation and $180.00 per month maintenance; in the second action, eighteen months later, the Reno, Nevada, District Court gave Mr. Estin an absolute divorce.

Mr. Estin was personally served with the summons and complaint in the Separation Action, in New York County, within the jurisdiction of the Court (R. 20), and a certified

copy of the judgment of Separation and maintenance was personally served on him on October 27th, 1943 (R. 22).

Mrs. Estin was not personally served with the summons and complaint in the Divorce Action, within the jurisdiction of the Nevada Court; she was not served in Nevada. She was served by publication and by personal service of copies of the summons and complaint in New York County, New York (R. 55-R. 60).

There is a valid, existing, adjudicated separation agreement between the parties hereto which gives to Gertrude Estin the contract right to collect $180.00 per month for her maintenance (R. 23-R. 36; R. 127; R. 21).

Argument

I. There is no statement in the Petition for a rehearing that the decision of this Honorable Court, denying the Writ of Certiorari was improvident or in what particular it was not just. There is not a statement in the Petition for rehearing to show how or in what particular the decision of this Honorable Court in granting the Writ of Certiorari in the case of *Kreiger* v. *Kreiger* was inconsistent with the decision of this Honorable Court in denying the petition for a Writ of Certiorari in the instance case of *Estin* v. *Estin*.

Southern Power Co. v. *North Carolina Pub. Serv. Co.*, 263, U. S. 508.

II. No constitutional issue is raised by the petition herein either in form or substance.

III. The issue the petitioner attempts to raise has been resolved repeatedly by the decisions of this Honorable Court.

For the argument on Points II and III counsel respectfully refers to his brief filed herein on or about July 28th, 1947 in opposition to Petitioner's application for a Writ of Certiorari, of which the Petitioner is now asking a rehearing.

In the record in the case of *Kreiger* v. *Kreiger,* there is no separation agreement. There had been one which the judgment of separation and maintenance granted to Mrs. Kreiger by the New York Supreme Court, voided for fraud on the part of Mr. Kreiger.

There is no question and it has not been claimed anywhere in the trial of this action or in the arguments in the Courts below that a judgment of divorce by default in which action the defendant has not been personally served with the summons and complaint has any effect upon or can annul any contract rights which the defendant has against the plaintiff.

This point was not in the Kreiger case.

The New York Court of Appeals in its decision, had in mind Mrs. Estein's Separation Agreement and that Mr. Estin's Nevada divorce had no effect on it (R. 162) for it cites:

> "A Court which lacked jurisdiction over the person of a husband was powerless to set aside a separation agreement in an action brought against him by a wife."
>
> *Jackson* v. *Jackson,* 290 N. Y. 512.

The Supreme Court of New York in Queens County, gave to the respondent, plaintiff below, a judgment of Separation and maintenance because of proof that the parties lived apart, that the defendant, petitioner here, wilfully abandoned her from April 14th, 1942 to October 13th, 1943, the date of the judgment and after, a period of eighteen months, with intention of not returning. The District Court in Washoe County, Nevada, on identical testimony as above pointed out, gave the petitioner, plaintiff there, defendant in the New York Court, a divorce from the respondent, defendant in the Nevada Court, plaintiff in the New York Courts, because of continuous separation for three years from April 14th, 1942 to May 24th, 1945, which included the same 18 months separation for which the New York Supreme Court, Queens County, had given the respondent, defendant in Nevada, a prior judgment of Separation and maintenance against the petitioner.

> "The judgment in New York legalizing the separation precluded the possibility that the same separation could constitute wilful desertion (living apart) of the husband by the wife."
>
> *Barber* v. *Barber*, 21 How. (62 U. S.) 582.
>
> "The final decree entered in the Circuit Court in Cook County, Illinois, in legal effect established that the separation then existing was lawful and therefore conclusively operated to prevent the same desertion from constituting a wilful desertion by the wife of the husband."
>
> *Harding* v. *Harding*, 198 U. S. 317.

The judgment of Separation and maintenance herein given to Gertrude Estin, the respondent, by the Supreme

Court of New York in Queens County on October 13th, 1947 was and is conclusive of the rights of the parties here and in every other court including the District Court in Washoe County, Nevada.

> "Under 'the full faith and credit' clause and the Act of Congress implementing it, what has been adjudicated in one State is res adjudicata to the same extent in every other State. The purpose of the 'full faith and credit' clause was to establish throughout the federal system the salutary principle of the common law, that litigation once pursued to judgment shall be conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other state.
>
> "Because there is a 'full faith and credit' clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into judgment and a plaintiff may not for his single cause of action secure a second or a greater recovery."
>
> *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430;
> *Forsyth* v. *Hammond,* 166 U. S. 506, 509.

This is the Law in New York.

> *Lorrillard* v. *Clyde,* 122 N. Y. 41;
> *Williamsburgh Savings Bank* v. *Town of Solon,* 136 N. Y. 465;
> *Pray* v. *Hegeman,* 98 N. Y. 351;
> *Smith* v. *Smith,* 79 N. Y. 76.

It is the law in Nevada.

> *Vickers* v. *Vickers,* 45 Nev. 274, 202 Pac. 31.

This point has been vehemently urged by the respondent's counsel in the arguments in this proceeding (R. 133, fol. 399). The Appellate Division of the Supreme Court of New York, Second Department, affirmed the judgment of the Court below without opinion.

This point does not occur in the case of Kreiger v. *Kreiger.*

Nowhere in the record in the latter case does it appear or is it claimed that Mr. Kreiger's Nevada divorce is not valid.

The Court of Appeals of the State of New York in its opinion assumed, for the purpose of its decision, the Divorce Judgment of the Nevada Court to be valid and gave to the Nevada decree "full faith and credit" to so much of the Nevada decree as pronounced the dissolution of the marriage (R. 159). It gave to the Nevada decree all of the faith and credit which a Nevada Court could give to it and then held and adjudged that Gertrude Estin's judgment and separation agreement are vested rights of property which a default judgment in rem in an action for divorce only, in a case in which she was not personally served with the summons and complaint within the jurisdiction of the court could not and did not affect, supercede or annul. This is the law in New York.

Livingston v. *Livingston*, 173 N. Y. 377;
Harris v. *Harris*, 259 N. Y. 334;
Waddy v. *Waddy*, 290 N. Y. 247.

It is the law in the United States.

Lynde v. *Lynde*, 181 U. S. 183;
Sistare v. *Sistare*, 218 U. S. 1;
Barber, Stella v. *Barber, George*, 323 U. S. 77.

In his Petition for Rehearing, Petitioner's Counsel in his brief in support thereof, has not followed or complied with Rules 27 and 38 of the Rules of the Supreme Court of the United States.

Southern Power Co. v. *N. C. Pub. Service Co.*, 263 U. S. 508;
Magnum Import Co. v. *Coty*, 262 U. S. 159, 163;
Furness Withy Co. v. *Yang Tze Ins. Assn.*, 242 U. S. 430.

WHEREFORE the Respondent prays that the Petition for a Rehearing of the decision of this Honorable Court dated October 13th, 1947, dismissing the Petitioner's application for a Writ of Certiorari to the Court of Appeals of the State of New York, be denied:

That upon such denial the respondent be awarded costs to defray her expenses for printing briefs and opposing the petition; and

That the petitioner have such other and further relief as may be just.

Dated: New York, N. Y., December 11, 1947.

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Of Counsel.